SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK, *Appellants*,

v.

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, *Appellee*,

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN,

Appellees-Intervenors.

BRIEF FOR CITIZENS FOR EDUCATIONAL FREEDOM, AMICUS CURIAE

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TABLE OF CONTENTS

PAGE

Interest of Amicus 1

Summary of Argument 2

Argument 3

Point I

The New York Education Law for the Loan of Textbooks to All Pupils Does Not Violate and Does Effectuate the First Amendment 3

Point II

The New York Trial Court's Judgment Distorted the Words of the Loan of Textbooks to Pupils Law, Constructed a Religious Test and Significantly Involved New York in Violating the First and Fourteenth Amendments, Therefore, the Judgment of the New York Court of Appeals Should Be Affirmed 8

Conclusion 12

TABLE OF AUTHORITIES

CASES:

American Communications Assn v. Douds, 339 U.S. 382 (1950) 7

Barenblatt v. U. S., 360 U.S. 109, 112 (1959) 5

Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930) 5

Everson v. Board of Education, 330 U.S. 1 (1947) 7, 8, 12

Griswold v. Connecticut, 381 U.S. 479 (1965) 4

Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967) 5

Lamont v. Postmaster General, 381 U.S. 301 (1965) 6, 7

AUTHORITIES (CONTINUED)

PAGE

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 5

Poindexter v. Louisiana Financial Assistance Commission, 275 F.Supp. 833 (1967), affirmed .....U.S. ....., 1-15-68, 19 L.ed 2d 780 5

Reitman v. Mulkey, 387 U.S. 369 (1967) 12

Shelley v. Kramer, 334 U.S. 1 (1948) 12

Sherbert v. Verner, 374 U.S. 398 (1963) 7

Speiser v. Randall, 357 U.S. 513 (1958) 5

Time, Inc. v. Hill, 385 U.S. 374 (1967) 5

Torcaso v. Watkins, 367 U.S. 488 (1961) 4

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 4

UNITED STATES CONSTITUTION:

First Amendment 4, 5, 6, 7, 8, 12

Fourteenth Amendment 2, 12

STATUTES:

Federal Elementary and Secondary Education Act of 1965 (P.L. 89-10, 89th Cong. 1st Sess.) Sec. 203 (a) (3)(A), Title II, Sec. 201, 79 Stat. 36, 20 U.S.C. Sec. 821-862 (Supp. 1967) 11

New York Education Law for the Loan of Textbooks to All Pupils in Grades Seven through Twelve (1965), Sec. 701, Amended by Chap. 320 of the Laws of 1966 .....3, 6, 11, 12

OTHER AUTHORITIES:

111 Cong. Rec. 5563, (Daily Ed., March 24, 1965).....10, 11

Hearings before General Sub-Committee on Education on H.R. 2361 and 2362, House of Representatives, Part 2, 89th Cong., 1st Sess. 10

AUTHORITIES (CONTINUED)

PAGE

NEA, Research Memo — 1963-32 on Selection and Distribution of Elementary and Secondary School Textbooks (November 1963) 6

NEA and AASA Report — Methods of Providing Textbooks in Local School Systems, 1965-66 — August 1966 6

S. Rep. No. 146, 89th Cong., 1st Sess. 25 (1965) 11

Thirtieth Yearbook of National Society for the Study of Education, Part II, Public Schools 1931, p. 275-292 9

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BRIEF FOR CITIZENS FOR EDUCATIONAL FREEDOM, AMICUS CURIAE

Interest of CEF as Amicus

Citizens for Educational Freedom (CEF) is a non-sectarian, non-partisan, non-profit, national organization of parents, and other citizens dedicated to an open American society. CEF strives through the democratic processes to win freedom, equality and excellence in education for every American child regardless of race, creed, color,

ancestry, or the character of the school of attendance. It is committed to *fairness to children* . . .

As civic groups the over one thousand local chapters of CEF, are active in thirty-six States and the District of Columbia. CEF has its national office at our Nation's Capital. Various races and creeds are represented in the parents' groups. Its over 150,000 members are as diverse in their geographical distribution as in their social and economic positions.

It is the Citizens' position that the First Amendment inter-dependent freedoms of conscience, of learning, of speech, and of communication are paramount.

CEF supported the passage of the New York Education Law for the loan of textbooks to all pupils in grades seven through twelve as an implementation by the New York Legislature of those First Amendment inter-dependent freedoms of the pupils and their Fourteenth Amendment rights to due process and equal protection of the laws. The New York Law for the loan of textbooks to all pupils is the fruit of the racially and religiously neutral policy of the State of New York to provide the means of education to, and for, all pupils on equal terms.

This brief is filed with the written consent of all of the parties.

SUMMARY OF ARGUMENT

The New York Education Law for the loan of textbooks to all pupils effectuates and does not violate the First Amendment. It is not argued that under present constitutional standards the State of New York was required to include children enrolled in non-public schools, sectarian or non-sectarian, when providing free textbooks. A state may elect to provide a means of education for its

children attending schools complying with the compulsory education law. Providing secular textbooks needed for secular instruction is clearly within a state's discretionary power. So long as such a law is in force, the First Amendment will not tolerate a fetter on the right of any child's learning-freedom especially on the basis of the child's religion.

The New York Education Law for the loan of textbooks to all pupils was designed to satisfy the need for all children for secular textbooks for needed secular education. This was a sound educational objective. The Order and Judgment of the New York Supreme Court, Albany County, disregarded the plain words and purpose of the statute and constructed a religious test. This significant state involvement was violative of the First Amendment religion clauses and of the due process protection of the Fourteenth Amendment.

ARGUMENT

POINT I

The New York Education Law for the Loan of Textbooks to All Pupils Does Not Violate and Does Effectuate the First Amendment.

The New York Education Law for the loan of textbooks to all pupils in grades seven through twelve in all schools speaks for itself of one clear purpose — to provide secular textbooks needed for secular education to any and all pupils on individual request. The Act provides no test and is blind, not to the need, but to the creed, color, national origin, and the character of the school of attendance of the pupil. The secular textbooks are made available at state expense through public selection and distribution.

The majority opinion of the New York Court of Appeals finds that the statute

> "is meant to bestow a public benefit upon all school children, regardless of their school affiliation * * *. The State and local governments have long provided public libraries with books for use by all persons. * * *" and thus "* * * there is no federal constitutional question under the establishment clause of the First Amendment * * * Section 701 remains completely neutral with respect to religion merely mak-available secular textbooks at the request of the individual student and asking no question about what school he attends." (A 66a, 67a)

This *amicus* emphasizes that it is *not* arguing that under present constitutional standards, the New York Legislature was obliged to include children enrolled in non-public schools when providing free textbooks. That question is not before this Court. The fact is the New York Legislature did include all school children without exception, and on an equal basis.

This law does not violate and does effectuate the First Amendment guarantees of freedom.

The First Amendment establishment clause prohibits a state establishment of, or a preference for "a belief or disbelief in any religion", *Torcaso v. Watkins*, 367 U.S. 488 at 495 (1961). The First Amendment also neutralizes the Appellant Board of Education from adopting any established belief to prevail over the child's First Amendment right of freedom of religion. (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)).

Each child has a First Amendment right to read. (*Griswold v. Connecticut*, 381 U.S. 479 (1965)). The right of the press to print in an open society, and the right of the teacher to teach are necessary, preferred freedoms in an open society.

These First Amendment guarantees of speech and press "are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system in an open society." (*Time, Inc. v. Hill,* 385 U.S. 374 at 389 (1967)). Also, the First Amendment guarantees of speech and press, when applied to the teacher as a means of education, are not for the benefit of the teacher so much as for the benefit of the student and all of us. (*Keyishian v. Board of Regents of New York,* 385 U.S. 589 (1967); *Speiser v. Randall,* 357 U.S. 513 (1958); *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963)).

Academic teaching-freedom and its "correlary learning-freedom are so essential to the well being of the Nation * * *" that "* * * this Court is always on the alert against intrusion into this constitutionally protected domain." (*Barenblatt v. U. S.,* 360 U.S. 109, 112 (1959)).

The First Amendment learning-freedom of the child in an open society is of benefit to the child, but also for the benefit of all of us and the well being of our Nation.

"The school children and the state alone are the beneficiaries" was the controlling reason for the unanimous decision of this Court in *Cochran v. Louisiana Board of Education,* 281 U.S. 370 (1930) affirming 168 La. 1005, 123 So. 655 (1929).[1]

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[1]Plaintiff did not allege a violation of either First Amendment religion clause. The issue in **Cochran** was made on plaintiff's contention that religion was aided through the state making free school books available for the use of children in parochial schools. The Complaint alleged that this aid was the taking of private property for a private purpose in violation of the Fourteenth Amendment. On January 15, 1968, in **Louisiana Financial Assistance Commission v. Bryan Poindexter, this Court** ____U.S.____, 19 L.ed 2d 780, affirmed the three judge District Court decision (275 F. Supp. 833 at 835) which held: "The free lunches and textbooks Louisiana provides for all its school children are the fruits of racially neutral benevolence. Tuition grants are not the products of such a policy. They are the fruits of the State's traditional racially biased policy of providing segregated schools for white pupils."

Once the state provides a new means of secular education for all children, it may not fetter that means of knowledge any more than the Federal government may fetter an addressee's First Amendment right to receive his mail. (*Lamont v. Postmaster General,* 381 U.S. 301 (1965)).

Prior to 1965, the New York Education Law only authorized school boards to purchase textbooks and either sell or rent them to pupils in public schools. Prior to September 1, 1966, the State of New York, like seventeen other States, did not, at state expense, provide free textbooks for pupils in either secondary public or private schools. The practice in New York was grouped with other states "Not required to provide free textbooks; do not provide rental of textbooks (presumably purchased)". (NEA Research Memo 1963-32, *Selection and Distribution of Elementary and Secondary School Textbooks,* November 1963, pp. 6 and 7). In August 1966, the Educational Research Service of the American Association of School Administrators and the Research Division, NEA, reported on *Methods of Providing Textbooks in Local School Systems,* 1965-66. This report showed that the method of providing textbooks in public secondary schools at Syracuse, New York was: "purchased by all pupils"; at Elmira, New York, grades 10-12: "some free, some purchased"; at Rome, New York: "purchased by all pupils"; at Schenectady, New York, grades 10-12: "rented by all except needy pupils, free to needy"; and at Utica, New York: "rented by all pupils".

The education law for the loan of textbooks to all pupils in grades seven through twelve for the first time in New York's history provided free textbooks at state expense for all pupils, regardless of the character of the school of attendance.

The United States may establish and give up the post

office when it sees fit. The State of New York may enact and repeal a law for the loan of textbooks to pupils. In this respect the State of New York is like the United States. So long as the United States carries the mails, and so long as the New York Law provides for the loan of textbooks to all pupils in specified grades, the First Amendment freedom of speech demands that the rights to receive the material remain unfettered, (*Lamont v. Postmaster General, supra*) especially from fetters based on the recipient's religion.

The public official and those on public payroll may not make educational means, benefits or facilities that have been provided by the state for all children "available in an arbitrary way or exact surrender of freedoms unrelated to the purpose of the facility." (*American Communications Assn. v. Douds,* 339 U.S. 382 at 417 (1950); *Sherbert v. Verner,* 374 U.S. 398 at 404 (1963)).

> "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial or placing of conditions upon a benefit or privilege."

In that same decision the religiously neutral mandate of the First Amendment was reaffirmed, the Court holding that:

> " • • • no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.' *Everson v. Board of Education,* 330 U.S. 1, 16." (374 U.S. at 410) (emphasis in opinion)

In summary, no one argues that under present constitutional standards a state is mandated to include children enrolled in non-public schools when providing free text-

books. A state may elect to provide a means of education for some or all of its children attending schools complying with the compulsory education law. A state may choose not to do so. Providing secular textbooks needed for secular instruction for all children regardless of "the character of the school" of their attendance is clearly within a state's discretionary power. So long as such a law is not repealed, the First Amendment will not tolerate a fetter on the right of any child's learning-freedom especially on the basis of the child's religion. The New York loan of textbooks law does not violate and does effectuate the inter-dependent rights of freedom of conscience, of learning, of speech, and of communication so vital to the existence and progress of our free and open society.

POINT II

The New York Trial Court's Judgment Distorted the Words of the Loan of Textbooks to Pupils Law, Constructed a Religious Test and Significantly Involved New York in Violating the First and Fourteenth Amendments. Therefore, the Judgment of the New York Court of Appeals Should Be Affirmed.

On its face, the New York Education Law for the loan of textbooks to all pupils is neutral as to the religion or race of the child. Its sole concern is the child's need for secular textbooks for needed secular education.

This New York law appears entirely consistent with the views of Mr. Justice Jackson as expressed in his dissent in *Everson v. Board of Education.* His dissent criticized the New Jersey statute that made "the character of the school, not the needs of the children determine the eligibility of parents to reimbursement" for public bus fare for their children to ride to and from school. He

found the New Jersey law did not authorize "transportation to all pupils to all schools * * *." Children "are to be aided if they attend the public schools or private Catholic schools and they are not allowed to be aided if they attend private secular schools or private religious schools of other faiths". (*Everson v. Board of Education*, 330 U.S. 1 at 20 and 21).

Paralleling Mr. Justice Jackson's constitutional test, educators have advocated that the test for good textbook legislation is that it be framed in the interest of the most important party affected, the child.

The *Thirtieth Yearbook of the National Society for the Study of Education* was devoted to "The Textbook in American Education". W. L. Coffey, a national authority on the standards for evaluating textbook legislation and on judicial opinions on textbooks, reported:

> "The fact that some states leave to the school districts or their agents the authority to adopt textbooks while others deal with this subject through a central agency, such as a textbook commission or a board, is not important, except as it might effect the service which the textbook is meant to offer. What is important is whether textbook legislation favors the child and whether courts, to that end, have maintained a liberal policy . . .
>
> "A textbook statute should be framed in the interest of the parties affected. The most important member of these parties is the child. The states' future welfare will depend in part upon the type of training he receives. In this country, the textbook is one of the essential tools used in this training." (*Thirtieth Yearbook of National Society for the Study of Education*, Part II, Public Schools, 1931, pp. 275, 292).

To remove doubts about the constitutionality of the Federal law providing Federal funds for school books "for the use of children and teachers in public and private elementary and secondary schools", Congress solicited advice from constitutional law experts. The Federal law as introduced, focused on school books "to be furnished to schools", after taking "into consideration the relative needs of the schools of the State". (111 *Cong. Rec.* 5563, Daily Ed., March 24, 1965)

Congressman John Brademas of Indiana asked Leo Pfeffer, often counsel for the American Jewish Congress, if he would have grave constitutional doubts if government funds were used for the purchase of textbooks, title to the books resided in a public agency and the books were made available to school children in both public and parochial schools. Mr. Pfeffer answered:

> "I think these constitutional doubts can be solved, and I think careful draftsmanship can avoid them. For example, as I indicated, you cannot make eligibility based on the nature of the school the child attends. Once you do that, you are in trouble. You must make it available to all on equal terms, and it must be a relationship exclusively either between the federal government or a state public agency, and the child, without any intervening school agency. I think that can be done. Something like that can be done. I am not passing judgment. Something like it is being tried in Rhode Island." (Part 2, *Hearings before General Sub-Committee on Education on H.R.* 2361 *and H.R.* 2362, 89th Cong. 1st Sess., pp. 1615, 1618, also 1632).

Amendments of the General Sub-Committee and Full Committee on Education of the House "adopted clarifying language which makes clear that library resources, textbooks, and other printed and published materials, are

not being made available to schools but to children and teachers." (111 *Cong. Rec.* 5563 (Daily Ed., March 24, 1965)). Thus, the "relative need" criterion of Section 203 (a)(3)(A) of Title II, E.S.E.A. was changed from "the relative needs of the schools of the state" to "the relative need of the children and teachers of the state for such library resources, textbooks, or other instructional materials . . .". Title II, states the *Senate Committee Report,* was amended to assure that it was "designed *to benefit children and not schools*". (S. Rep. No. 146, 89th Cong., 1st Sess. 25 (1965)).

Appellant's brief fancies the New York statute to be framed not in the interest of the child as it plainly states, but in the interest of the school. With such a fanciful reading of the law for the loan of textbooks to pupils, the Appellant Board in its brief (p. 25) says:

> "Here it would have to be argued that the *exclusion* of parochial schools from the coverage of the law would constitute a denial of equal protection and a denial of religious freedom."

Neither the New York Court of Appeals, nor the appellees, nor this *amicus* so argue. New York did not have to adopt state tax provided means of secular education for the benefit of all pupils, but it has done so.

Appellant Board, however, is asking this Court to reinstate the Order and Judgment of the Supreme Court, Albany County, that carved out from the benefit of the New York Law any pupils in any private schools "wholly or in part under the control of any religious denomination or in which any denomination tenet or doctrine is taught." (A 3a, Plaintiff's Complaint, paragraph 8). That Supreme Court, Albany County, responded to plaintiff's plea and created a religious test which excludes an entire class of

children on religious grounds. Thus, to this Court is presented a religious test created by a state Court. For a state Court to create such a religious test is significant state involvement and violative of the First Amendment religion clauses and of the due process protection of the Fourteenth Amendment. (*Shelley v. Kramer*, 334 U.S. 1, (1948); *Reitman v. Mulkey*, 387 U.S. 369 (1967)). A reinstatement of that Order and Judgment would render pupils ineligible for secular textbooks needed for secular instruction because of "the character of the school" they attend. Such a reason for ineligibility was condemned by Mr. Justice Jackson in his dissent in *Everson, supra.*

In summary, the New York Education Law for the loan of textbooks to all pupils was designed to satisfy the need for all children for secular textbooks for needed secular education. This was a sound educational objective. The Order and Judgment of the New York Supreme Court, Albany County, disregarded the plain words and purpose of the statute and constructed a religious test. This significant state involvement was violative of the First Amendment religion clauses and of the due process protection of the Fourteenth Amendment.

CONCLUSION

It is respectfully submitted that the Judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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March 19, 1968.